TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 503.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN BITTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

Filed November 29, 1907.

(20906)

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1 United States Circuit Court, Southern District of New York.

UNITED STATES,
vs.
JOHN BITTY.

And now comes the United States, by its attorney, Henry L. Stimson, and complains that in the record and proceedings had in this cause and in the judgment sustaining the defendant's demurrer to the indictment herein, manifest error has happened.

Wherefore said plaintiff prays for the allowance of a writ of error and for such other orders and process as may cause the same to be corrected by the Supreme Court of the United States.

Dated this 25th day of September, 1907.

HENRY L. STIMSON,
United States Attorney,
Attorney for Plaintiff.

Allowed:

E. H. LACOMBE,
United States Circuit Judge.

(Endorsed:) United States Supreme Court. United States of America. United States vs. John Bitty. Petition for writ of error. Henry L. Stimson, U. S. attorney, attorney for plaintiff. Due service of a copy of the within paper is hereby admitted this 25th Sept., 1907. Edward A. Alexander, atty. for deft. U. S. Circuit Court, Southern District N. Y. Filed Sept. 24, 1907. John A. Shields, clerk.

2 UNITED STATES OF AMERICA, *ss.*

The President of the United States of America, to the judges of the Circuit Court of the United States, for the Southern District of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between The United States, plaintiff, and John Bitty, defendant, a manifest error hath happened, to the great damage of the said plaintiff as is said and appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the Capitol in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the 22d day of October, 1907, that the record and proceedings aforesaid being

inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States ought to be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 25th day of Septem-
3 ber, in the year of our Lord one thousand nine hundred and seven and of the Independence of the United States the one hundred and thirty-second.

[L. S.]

JOHN A. SHIELDS,
Clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit.

The foregoing writ is hereby allowed.

E. H. LACOMBE,
U. S. Circuit Judge.

UNITED STATES OF AMERICA,
Southern District of New York, ss:

I, John A. Shields, clerk of the Circuit Court of the United States of America, for the Southern District of New York, in the Second Circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from one to twenty, inclusive, contain a true and complete transcript of the record and proceedings had in said Court in the cause of The United States, plaintiff in error vs. John Bitty, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the Southern District of New York, in the Second Circuit, this 18th day of November, in the year of our Lord one thousand nine hundred and seven, and of the Independence of the United States the one hundred and thirty-second.

[SEAL.]

JOHN A. SHIELDS,
Clerk.

4 (Indorsed:) Writ of error. Henry L. Stimson, U. S. attorney, attorney for plaintiff in error. Due service of a copy of the within paper is hereby admitted this 25th Sept., 1907. Edward A. Alexander, atty. for deft. in error. U. S. Circuit Court, Southern District N. Y. Filed Sept. 23, 1907. John A. Shields, clerk.

5 Circuit court of the United States of America for the Southern District of New York in the Second Circuit.

At a stated term of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit, begun and held in the city of New York, within and for the district

and circuit aforesaid, on the 3rd Wednesday of June, in the year of our Lord one thousand nine hundred and seven, and continued by adjournment to and including the seventh day of August, in the year of our Lord one thousand nine hundred and seven.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

The jurors of the United States of America within and for the district and circuit aforesaid, on their oath present that John Bitty, late of the city and county of New York, in the district and circuit aforesaid, yeoman, heretofore, to wit, on the fourth day of August, in the year of our Lord one thousand nine hundred and seven, at the southern district of New York, and within the jurisdiction of this court, did unlawfully, willfully, and feloniously import into the United States of America from a foreign country, to wit, England, a certain alien woman, to wit, one Violet Sterling, alias Miss Bitty, for an immoral purpose as hereinafter recited: and it was the purpose of the said John Bitty, in bringing and importing the said alien into the United States, as aforesaid, that she should live with him as his concubine, against the peace of the United States and their dignity and contrary to the form of the statute in such case made and provided.

HENRY L. STIMSON, *U. S. Attorney.*

6 (Endorsed:) U. S. circuit court. The United States of America vs. John Bitty. Indictment. Unlawfully bringing into the U. S. alien woman for immoral purposes. Sec. 3, immigration act, Feb. 20, 1907. Henry L. Stimson, U. S. attorney. A true bill, George E. Mead, foreman. U. S. Circuit Court Southern District N. Y. Filed Aug. 7, 1907. John A. Shields, clerk.

1907, Aug. 8. Deft. pleads not guilty. Bail $5,000. Aug. 8. Bench warrant issued.

Aug. 9. Deft. withdraws plea of not guilty and demurs to indictment. Bail reduced to $2,500.

Aug. 10. Filed opinion, Hough, J. Demurrer sustained.

7 FRIDAY, *August 9th, 1907.*

The court meets and is opened by proclamation.

Present: The Hon. George C. Holt, judge.

UNITED STATES, *vs.* JOHN BITTY. } 1—138.

On motion of U. S. attorney ordered arraignment.

Defendant having been duly arraigned withdraws plea of not guilty and enters demurrer. Bail ordered reduced to $2,500.

WEDNESDAY, *September 4th, 1907.*

The court meets and is opened by proclamation.
Present: Hon. Chas. M. Hough, judge.

UNITED STATES,
vs.
JOHN BITTY. } Doc. 1—138.

Argument of demurrer.
Edward Alexander, for defendant.
Thos. Thacher, asst. U. S. attorney for Government.
Submitted.

8 Circuit Court of the United States, Southern District of New York.

UNITED STATES OF AMERICA,
against
JOHN BITTY. } On demurrer to indictment under sec. 3 of the immigration act of Feb. 20, 1907.

E. E. Alexander, esq., for demurrer.
Henry L. Stimson, esq., U. S. attorney, opposed.

HOUGH, D. J.

The indictment demurred to alleges that Bitty did "feloniously import into the United States of America from a foreign country, to wit, England, a certain alien woman * * * for an immoral purpose, * * * and it was the purpose of the said John Bitty in bringing and importing the said alien into the United States as aforesaid that she shall live with him as his concubine."

The act under which this indictment is found (commonly known as the immigration act of 1907) declares that "Whosoever shall, directly or indirectly, import or attempt to import into the United States any alien woman or girl for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, any alien woman or girl within three years after she shall have entered the United States," shall be deemed guilty of a felony and may be punished up to five years' imprisonment and $5,000 fine.

9 The section just quoted therefore creates three distinct offenses, each punishable as a felony, viz:

(a) The importation of a woman for the purpose of prostitution or for any other immoral purpose;

(b) The holding of such woman in pursuance of such illegal importation, and

(c) The maintenance, supporting, or harboring in any house or other place for the purpose of prostitution or for any other immoral purpose any alien woman within three years after she shall have entered the country.

In plain language, this defendant is charged with having either brought his mistress into the United States or with having brought here a woman who, so far as his desires go, shall be his mistress, if she is not already.

He is thus accused of the first offence enumerated in the third section of the statute under consideration and the indictment therefore must stand or fall upon an interpretation of the words "or for any other immoral purpose."

I adopt the definition of prostitution given in Comonwealth vs. Cook, 12 Met., 93, at 97; i. e., "The act of permitting illicit intercourse for hire, an indiscriminate intercourse—what is deemed public prostitution."

It may be, as the court remarked in the case just cited, that this defendant is guilty of open violation of the divine law and of grossly immoral acts, so that such a case is not the most favorable for a dispassionate consideration of questions of law, the decision of which involves the question whether the party defendant shall be punished, or discharged as not guilty of any offence cognizable by the statute.

It is, however, necessary to apply to this statute, as to any other, the ordinary rules of construction concerning which the discussion at bar has not revealed any substantial difference of opinion between opposing counsel.

It may be admitted that the immigration act of 1907 is in its general scheme remedial; and it is not denied that it is the duty of the court to give to each intelligible word of the statute its exact and precise meaning according to common understanding of the intent of the legislature, so far as ascertainable from legal sources; and that intent, if expressed in apt language, must be enforced as long as the statute is in operation though the result be cruel or ridiculous.

So far as this statute is concerned I have been directed to no indication of legislative intent other than the language of the statute itself, except the report of the committee of the House of Represenatives on Immigration made to the 59th Congress at its first session (No. 4912), wherein it is stated that the scope of section 3 of this statute is extended beyond that of the corresponding section of the act of 1903 "so far as it relates to the immigration of prostitutes in order effectively to prohibit undesirable practices alleged to have grown up."

This I take to mean that the words "or for any other immoral purpose" have been added to the word "prostitution" in order to prevent undesirable practices alleged to have grown up in relation to the immigration of prostitutes.

Upon general principles the added words must be understood as meaning "for any other like immoral purpose," so that the question really becomes whether a man who brings his mistress into this coun-

try is committing an act ejusdem generis with bringing in a prostitute.

Concubinage is the act upon the part of the woman of cohabiting with a man without ceremonial marriage, or consent and intent, good at common law. A discussion of the difference between this
11 status and that of the prostitute would be both needless and nauseating; it suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class.

Considering the statute from a point of view perhaps more technical, it is, of course, an act highly penal and to be given in favor of the liberty of the citizen the narrowest construction consistent with the plain significance of its words. Many other statutes for several hundred years have contained similar clauses, and though it is certainly too late in the day to look with approval upon the doctrine that a statute making the "stealing of sheep or other cattle" a felony is too loosely expressed to warrant a conviction for stealing any other animal than a sheep (1 Black. Comm., 88); yet numerous cases can be cited, such as Ex parte Hill, 3 C. & P., 225, holding that under a statute making it a crime to maim "an ox, cow, heifer, sheep, or other cattle" it was not an offence to commit a like act against a bull; and People vs. Richards, 108 N. Y., 137, holding that under a statute making it burglary to break and enter "any shop, store, booth, tent, warehouse, or other building" one who broke into and entered a tomb or mausoleum was guilty of no crime.

Within the line of decisions, both ancient and modern, illustrated by above citations, I do not think the words "other immoral purpose," when used as modifying the word "prostitution," can be held to include concubinage.

I am the more willing to arrive at this result from observing what would be the effect of a contrary holding as applied to the third offence created by the section under consideration. "Whoever shall keep * * * in any house * * * for the purpose of prosti-
tution, or for any other immoral purpose, any alien woman
12 * * * within three years after she shall have entered the United States" shall be guilty of a felony. In other words, if the offence charged in this indictment be within the act, any man who unwittingly keeps an alien mistress within three years after she enters this country becomes a felon, even though (so far as the language of the statute is concerned) he has no knowledge whatever of her lack of citizenship. The weapon thus put in the hands of degraded women is so dangerous as to justify great insistence upon the penal character of this act and some distrust of its remedial virtues.

It remains to be considered whether any function can be assigned to the words "any other immoral purpose" under the construction of the statute above indicated. It appears to me that sufficient scope

is given for the application of the words by the fact that there are others besides the unfortunate women themselves who are concerned in the trade of prostitution. The procuress, thinly disguised as the keeper of an employment agency, and her female assistants, posing as servants, are figures too sadly familiar to the courts to need enumeration or description. It is to them and their kind that the general language of the act must be applied.

The demurrer is sustained.

C. M. HOUGH, *D. J.*

Sept. 9, 1907.

(Endorsed:) U. S. vs. John Bitty. Opinion Hough, J. U. S. Circuit court, southern district, N. Y. Filed Sep. 10, 1907. John A. Shields, clerk.

13 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
JOHN BITTY.

An indictment against John Bitty, the defendant above named, having been found and filed by the grand jurors in and for the southern district of New York on the 7th day of August, 1907, and thereafter the defendant having been arraigned and having interposed a demurrer to said indictment on the ninth day of August, 1907, and thereafter Edward A. Alexander having been heard in support of the demurrer, and Thomas D. Thacher, assistant United States attorney, having been heard on behalf of the United States,

Now, upon motion of Edward A. Alexander, attorney for the defendant, it is

Ordered that judgment be entered sustaining the demurrer and dismissing the indictment.

C. M. HOUGH, *U. S. Judge.*

The above is consented to as to form.

EDWARD A. ALEXANDER,
Attorney for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District of New York. The United States vs. John Bitty. Order for judgment. Henry L. Stimson, United States attorney, attorney for U. S. U. S. Circuit Court, southern district, N. Y. Filed Sep. 24, 1907. John A. Shields, clerk.

14 United States Circuit Court, Southern District of New York.

UNITED STATES
vs.
JOHN BITTY.

An indictment against John Bitty, the defendant above named, having been found and filed by the grand jurors of the United States

in and for the Southern District of New York, on the 7th day of August, 1907, and thereafter the defendant having been arraigned and having interposed a demurrer to said indictment, and an order having been entered on the 24th day of September, 1907, sustaining said demurrer.

Now on motion of Edward A. Alexander, attorney for the defendant, it is

Ordered and adjudged that the demurrer is sustained and the indictment dismissed.

Judgment filed this 24th day of Sept., 1907.

JOHN A. SHIELDS, *Clerk.*

The above is hereby consented to.

EDWARD A. ALEXANDER,
Attorney for Defendant.

(Endorsed:) U. S. Circuit Court, Southern District of New York. United States *v.* John Bitty. Judgment sustaining demurrer. Henry L. Stimson, United States attorney, attorney for U. S. U. S. Circuit Court, southern district, N. Y. Filed Sep 24, 1907. John A. Shields, clerk.

15 UNITED STATES OF AMERICA,
Southern District of New York, ss:

Be it remembered, that on this 11th day of September, in the year of our Lord one thousand nine hundred and seven, before me, James Ridgway, one of the commissioners duly appointed by the District Court of the United States of America for the southern district of New York, in the second circuit, to take acknowledgments of bail and affidavits, and also to take deposition of witnesses in civil causes depending in the courts of the United States, pursuant to the provisions of the act of Congress in that behalf, personally came John Bitty and severally acknowledged himself to owe to the United States of America, that is to say, the said John Bitty, the sum of two thousand five hundred dollars, to be levied and made of his goods and chattels, lands and tenements, to the use of the said United States, if default shall be made in the condition following, to wit:

Whereas the said John Bitty has been indicted by the grand jury of the Circuit Court of the United States for the southern district of New York with having, on the 5th day of August, in the year one thousand nine hundred and seven, at the southern district of New York, unlawfully, wilfully, and feloniously imported from a foreign country a certain alien woman for immoral purposes;

And whereas the said John Bitty has been brought before the Hon. Chas. M. Hough, one of the judges of said court, to answer to
16 the said indictment, and the said judge having ordered that the said John Bitty be discharged on giving his own recognizance, pending writ of error, if any, in the sum of two thousand five hundred dollars for his appearance at the next Circuit Court of the United States of America for the southern district of New York, second circuit, to be holden at the United States court building, in

the city of New York, on the second Wednesday of October, in the year one thousand nine hundred and seven, to answer all such matters and things as should be objected against him; and that in default of finding such bail the said John Bitty should stand committed.

Now, therefore, the condition of this recognizance is such that if the said John Bitty shall personally appear at a Circuit Court of the United States of America for the southern district of New York, second circuit, to be holden at the United States court building, in the city of New York, on the second Wednesday of October, in the year of our Lord one thousand nine hundred and seven, at 10 o'clock in the forenoon of that day, and then and there answer all such matters and things as shall be objected against him and abide the order of the court, and not depart the said court without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

Acknowledged before me the day and year first above written.

JOHN BITTY.

JAMES RIDGWAY,
Commissioner of the District Court of the United States for the Southern District of New York.

17 (Endorsed:) U. S. Circuit Court. The United States vs. John Bitty. Recognizance to appear and answer. Henry L. Stimson, U. S. attorney. U. S. Circuit Court, southern district of New York. Filed Sep. 11, 1907. John A. Shields, clerk.

18 United States Supreme Court. United States of America.

UNITED STATES
vs.
JOHN BITTY.

Assignment of error.

And now comes the United States, by Charles F. Bonaparte, Attorney-General of the United States, its attorney, and files the following assignment of error:

I. That the United States Circuit Court in and for the Southern District of New York erred in sustaining the demurrer interposed by the defendant to the indictment filed in this cause by construing section 3 of the act of Congress of February 20, 1907, chapter 1134 (34 Stat. L., 398), so as to hold that the facts stated in said indictment do not constitute a violation of the first and second clauses in said section and said act of Congress.

Wherefore the plaintiff prays that the judgment of said court be reversed and that this cause be remanded for further proceedings before the said court in accordance with law.

CHARLES J. BONAPARTE,
Attorney-General, United States of America,
By HENRY L. STIMSON,
United States Attorney for the Southern District of New York.

(Endorsed:) United States Supreme Court, United States of America. United States vs. John Bitty. Assignment of error. Henry L. Stimson, United States attorney, attorney for plaintiff. U. S. Circuit Court, Southern District of N. Y. Filed Sep. 24, 1907. John A. Shields, clerk.

19 *By the honorable, one of the judges of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit. To John Bitty, greeting:*

You are hereby cited and admonished to be and appear before the Supreme Court of the United States, at the Capitol in the city of Washington, on the 22d day of October, 1907, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the Southern District of New York, wherein the United States is appellant and you are appellee, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done in that behalf.

Given under my hand at the borough of Manhattan, in the city of New York, in the district and circuit above named, this 25 day of September, in the year of our Lord one thousand nine hundred and seven, and of the independence of the United States the one hundred and thirty-second.

E. H. LACOMBE,
Judge of the Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

20 (Indorsed:) Citation. Henry L. Stimson, U. S. attorney, atty. for plaintiff in error. Due service of a copy of the within paper is hereby admitted the 25th Sept., 1907. Edward A. Alexander, atty. for deft. in error. U. S. Circuit Court, Southern District N. Y. Filed Sep. 25, 1907. John A. Shields, clerk.

21 (Indorsed on wrapper:) United States Supreme Court. United States, plaintiff in error vs. John Bitty, defendant in error. Office of the clerk, Supreme Court U. S. Received Nov. 19, 1907.

22 (Indorsement on cover:) File No. 20906. S. New York, C. C. U. S. Term No. 503. The United States, plaintiff in error, vs. John Bitty. Filed November 22d, 1907. File No. 20906. Office of the clerk, Supreme Court U. S. Received Nov. 19, 1907.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF in error, v. JOHN BITTY. } No. 503.

MOTION TO ADVANCE.

John Bitty was indicted in the Circuit Court of the United States for the Southern District of New York on August 7, 1907, charged with having imported into the United States "from a foreign country, to wit, England, a certain alien woman, to wit, one Violet Sterling, alias Miss Bitty, for an immoral purpose as hereinafter recited; and it was the purpose of the said John Bitty in bringing and importing the said alien into the United States, as aforesaid, that she should live with him as his concubine," in violation of section 3 of the immigration act of February 20, 1907 (chap. 1134, 34 Stats., 398). The section of the statute referred to reads as follows:

"Whoever shall, directly or indirectly, import or attempt to import into the United States any alien

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woman or girl for the purpose of prostitution or for any other immoral purpose, shall be deemed guilty of a felony, and may be punished with up to five years' imprisonment and $5,000 fine."

A demurrer filed was sustained by the court, and this writ of error was sued out by the Government under the provisions of the act of March 2, 1907 (35 Stats., 1246).

As this is a criminal case and the first to reach this court in an attempt by the Government under the provisions of the new immigration act to break up what is known as the "white slave" trade, it is important that it should be promptly determined. The Solicitor-General, therefore, in accordance with rule 26, section 3, and the provisions of the criminal appeal act just referred to, moves the court to advance the case on the docket and set it down for hearing on such early day during the term as may be convenient to the court.

Notice of this motion has been served upon opposing counsel and proof of service filed with the clerk.

HENRY M. HOYT,
Solicitor-General.

DECEMBER, 1907.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1907.

THE UNITED STATES, PLAINTIFF IN ERROR, v. JOHN BITTY. } No. 503.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This case is here on a writ of error to the Circuit Court for the Southern District of New York. John Bitty, the defendant in error, was indicted in that court for violation of section 3 of the Immigration Act of February 20, 1907 (34 Stat., 898), the material part of which reads as follows:

THE STATUTE.

> Whoever shall directly or indirectly import or attempt to import into the United States any alien woman or girl for the purpose of prostitution *or for any other immoral purpose* * * * shall in every such case be deemed

guilty of a felony and on conviction thereof be imprisoned not more than five years and pay a fine of not more than $5,000.

THE INDICTMENT.

The indictment charges that "John Bitty * * * did unlawfully, willfully, and feloniously import into the United States of America from a foreign country, to wit, England, a certain alien woman * * * and it was the purpose of said John Bitty in bringing and importing the said alien into the United States as aforesaid that she should live with him as his concubine."

A demurrer was entered to the indictment. This was sustained by Judge Hough, and from the judgment a writ of error was sued out to this court.

ARGUMENT.

The declared intention of Congress is plain and unambiguous, but it will not be amiss to review the legislative provisions in relation to the importation of women, contained in prior acts.

The act of March 3, 1875 (18 Stat., pt. 3, p. 477), prohibited the "importation of women for purposes of prostitution," and made it also unlawful for "women imported for purposes of prostitution to immigrate into the United States." Although a number of statutes dealing with the general subject of immigration were passed within the next few years, it was not until 1903 that this particular phase of the general subject was again touched upon. In the act of March 3, 1903 (32 Stat., p. 1213), it was provided

(sec. 2) that the "following classes of aliens shall be excluded from admission into the United States * * * prostitutes and persons who procure or attempt to bring in prostitutes or women for the purpose of prostitution," and section 3 of the same act provides "that the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden, and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold any woman or girl for such purposes in pursuance of such illegal importation, shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars."

The report of the committee (H. R. No. 3021, vol. 2, 59th Cong., 1st sess.) having charge of the bill, which was finally enacted into law as the act of February 20, 1907, reads in part as follows:

> Your committee has deemed it advisable to report a comprehensive measure specifically repealing the immigration acts of March 3, 1903, and March 22, 1904, in order that for purposes of references all immigration legislation since 1902 might appear in a convenient form. The general immigration law of to-day is for the most part the act of March 3, 1903.
>
> Ten sections of that act are reenacted in this bill without any change whatever. Two sections are omitted from the present bill, as they do not relate to the subject of immigra-

> tion. Neither of these sections, however, are repealed. Twenty-eight sections of the old act are changed in greater or less degree, as specified below.

Under the heading "Specific changes" appears the following:

> Sec. 3. Strengthens the provisions with regard to the importation of prostitutes.

Under the heading "Reasons for various changes" this statement appears:

> In this section it is attempted to extend the scope of the law, so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up.

While it is apparent that the scope of the act, so far as it relates to the importation of women, has been broadened, the committee report does not throw any light on the meaning of the words "or for any other immoral purpose." That meaning must, therefore, be determined by the ordinary rules of statutory construction.

I.

The rule ejusdem generis does not apply.

In sustaining the demurrer the learned trial judge relied on the well-known rule of construction that where general terms follow specific words their meaning is to be taken as limited by the words which precede them. In his opinion Judge Hough said:

> A discussion of the difference between this status (concubinage) and that of the prosti-

> tute would be both needless and nauseating; it suffices to say that from any point of view, historical, social, or legal, I do not think that the mistress is near enough to the prostitute to be included by general words in a statute directed against the latter unfortunate class.

The rule of *ejusdem generis* is merely a technical rule of construction, and, as was said by Judge Story:

> This is a legislative act, and is to be interpreted according to the intention of the legislature, apparent upon its face. Every technical rule as to the construction or force of particular terms must yield to the clear expression of the paramount will of the legislature. (*Wilkinson* v. *Leland*, 2 Peters, 662.)

The courts have frequently declined to apply the rule *ejusdem generis* where by so doing the manifest intention of the legislature would have been defeated.

In *State* v. *Holman* (3 McCord, 306) the supreme court of South Carolina held, in construing a statute which forbade putting into "any bag, bale or bales of cotton any stone, wood, trash-cotton, cotton seed, *or any matter or thing whatsoever*, or causing the same to be done, for the purpose of cheating or defrauding any person," that it was violated by a person who put *water* in a bale of cotton.

In *State* v. *Williams* (2 Strob. L. R., 474), the indictment charged the defendant with a violation of an act making it larceny to take cotton, rice, or *other grain* from a field. The court ruled that taking *peas* was forbidden by the use of the words "other grain."

In *Regina* v. *Payne* (L. R., 1 C. C., 27) it was held that *a crowbar* conveyed into a jail for the purpose of assisting a prisoner to escape was an "other article or thing" within the meaning of the statute which provided that "Every person who aids any prisoner in escaping or attempting to escape from any prison, or who, with intent to facilitate the escape of any prisoner, conveys or causes to be conveyed into any prison any mask, dress, or any letter *or any other article or thing* shall be guilty of felony," etc.

See also:

Willis v. *Mabon*, 48 Minn., 140, p. 155.
Webber v. *City of Chicago*, 148 Ill., 314.
Gillock v. *The People*, 171 Ill., 307.
Woodworth v. *State*, 26 Ohio St., 196.
Winters v. *Duluth*, 82 Minn., 127.
City of St. Joseph v. *Elliott*, 47 Mo. App., 418.
Foster v. *Blount*, 18 Ala., 687.
Haigh v. *The Town Council of Sheffield*, L. R., 10; Q. B., 102.
Bows v. *Fenwick*, L. R., 9; C. P., 339.

The immigration act of 1907 should be considered as a whole and in connection with other statutes *in pari materia* in determining its meaning. When we read sections 2 and 3 of the act together we find that the clearly expressed purpose of the Congress is to prevent the immigration of numerous classes of persons regarded as undesirable additions to the population of the country. Among those excluded are

idiots, epileptics, paupers, professional beggars, persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease, persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude, polygamists, anarchists, and contract laborers, as well as prostitutes and women or girls brought in for purposes of prostitution or for any other immoral purpose.

The Congress has deliberately made the exclusion of persons more comprehensive in the act of 1907 than in the acts of 1891 (26 Stat., 1084), 1893 (27 Stat., 569), and 1903 (32 Stat., 1213). The narrow construction placed upon the act by Judge Hough defeats the intention of the legislature, which clearly was to exclude various undesirable classes of persons, among others women of loose moral character.

II.

The application of the rule ejusdem generis does not help defendant in error.

Even if it should be conceded that the rule *ejusdem generis* should be applied, it is respectfully submitted that the finding of the court below is not warranted by the language of the statute. The words "for any other immoral purpose" must be given some meaning. To hold, as Judge Hough does, that they apply to the importation of procuresses is to limit them to an extent evidently not contemplated by the Congress and altogether unreasonable in itself. It can hardly be supposed that procuresses are likely to be imported in appreciable numbers and the statute

deals directly with the procuress when she brings in women for the purpose of prostitution.

The courts have repeatedly refused, even when applying the rule *ejusdem generis*, to apply it in a narrow sense.

In *Misch* v. *Russell* (136 Ill., 22), the question before the court was whether the county court had jurisdiction to determine an election contest for the office of president of the board of education of a school district, under a statute which provided:

> * * * the county court shall hear and determine contests of election of all other county, township, and precinct officers, and all other officers for the contesting of whose election no provision is made.

It was held that the county court had jurisdiction and that the rule *ejusdem generis* could not be held to require the rejection of general terms entirely, but only that they should be restricted to cases of the same kind as those expressly enumerated, and that in the statute under consideration county school districts and precincts had one quality or characteristic in common, namely, that they were all *quasi*-municipal corporations.

See also:

Queen v. *Edmundson*, 2 Ellis & Ellis, 77;
County of Union v. *Ussery*, 147 Ill., 204.

It might, perhaps, be urged with some show of plausibility that, if the rule *ejusdem generis* applies at all in the case at bar, section 3 of the act does not prohibit the importation of a woman who is a skilled counterfeiter or an expert pickpocket for the

purpose of following either of these undesirable and immoral occupations, but it is certainly evident that the importation of a woman for the purpose of illicit sexual intercourse is an act *ejusdem generis* with bringing her in for purposes of prostitution.

There remains only to consider the natural and proper interpretation to be placed upon the meaning of the word "immoral."

Webster's International Dictionary defines "immoral" as: "Not moral; inconsistent with rectitude, purity, or good morals; contrary to conscience or the divine law; wicked; unjust; dishonest; vicious; licentious," and gives as synonyms: "Wicked; sinful; criminal; vicious; unjust; dishonest; depraved; *impure; unchaste;* profligate; dissolute; abandoned; licentious; lewd; obscene."

The Standard Dictionary defines "immoral" as "inconsistent with moral rectitude; violating moral or divine law; morally wrong; specifically, *contrary to purity.*"

It can hardly be denied that the act of the defendant in error in importing the woman mentioned in the indictment is one which is generally condemned by the moral sense of all enlightened communities and is assuredly contrary to purity. But it is more than that. Both the common and statute law have uniformly recognized illicit sexual relations as immoral, and courts have repeatedly refused to enforce contracts the consideration for which was future illicit cohabitation. Such purpose is one which the law seeks to defeat and holds as against sound public

policy and deserving of condemnation by right-thinking men.

The Government submits that the conduct of the defendant in error was "immoral" *as matter of strict law* and believes that this position is amply sustained by the authorities.

Bouvier's Law Dictionary (vol. 1, p. 984) gives this definition of "immorality:"

> That which is *contra bonos mores.* In England it is not punishable in some cases at the common law, on account of the ecclesiastical jurisdictions—e. g., adultery. But except in cases belonging to the ecclesiastical courts, the court of King's Bench is the *custos morum,* and may punish *delicta contra bonos mores.*"

In *Ralston* v. *Boady* (20 Ga., 449), which was an action on debt for rent, the court held that there could be no recovery if the landlord, knowing that his house is to be used for prostitution, lets it for that purpose. "The contract being *contra bonos mores* will not support an action." (*Girardy* v. *Richardson,* 1 Esp. Rep., 13; *Jennings* v. *Throgmorton,* 21 E. C. L. Rep., 430; *Commonwealth* v. *Harrington,* 3 Pick. Rep., 26.)

In *Potter & Son* v. *Gracie* (58 Ala., 303), which was an action to set aside a conveyance made by one James Johnston to the defendant, Mary Gracie, who was his mistress, the court laid down the following rule:

> A contract, the consideration of which is future illicit cohabitation, like all agreements

> to do acts forbidden by the law of God, or in furtherance of immorality, is utterly void.

In *Walker* v. *Perkins, Admr.* (3 Burrows, 1568; 1 W. Black., 517), which was an action on a bond, it appeared that the bond was given by the intestate to the plaintiff, reciting that William Perkins (the intestate) and Sarah Walker had agreed to live together and therefore he had agreed to find her meat, drink, washing, lodging, etc., and to leave her an annuity of 60 pounds a year if he quitted her or she outlived him; and if they had any child he was to take care of and provide for it. But if she should leave him or go to another man, then he should not be obliged to provide for her any longer or to leave her an annuity.

The defendant pleaded that this was an agreement between the plaintiff and his intestate to live together in a state of fornication, and that such a bond made in pursuance and support of an agreement to live together in fornication is void in law. Lord Mansfield said:

> It is the price of prostitution, *praemium prostitutionis:* for if she becomes virtuous she is to lose the annuity. It appears clearly, upon the condition, that the bond is illegal and void.

In *Nye* v. *Moseley* (6 Barnewall & Cresswell, 133), Bayley, J., said:

> But fornication is immoral as well as adultery. Both are offenses punishable in the spiritual court.

See also:

Walker v. *Gregory*, 36 Ala., 180;
Winebrinner v. *Weisiger*, 19 Ky., 33;
Reed v. *Brewer*, 36 S. W., 99;
Mackbee v. *Griffith*, 2 Cranch., C. C., 336.

It is to be noted that in these cases no distinction in kind is drawn between mere illicit cohabitation and prostitution. Both are immoral in the eye of the law; if they differ, it is merely in the *degree* of immorality.

In a series of statutes various legislative bodies have recognized the immorality of both fornication and adultery:

Sec. 11, c. 38, p. 669, R. S. of Illinois;
Sec. 381, vol. 3 (1892), Code of Georgia;
Sec. 874, Code of District of Columbia;
Sec. 269, Statutes and Amendments, Code of California, 1905;
Sec. 5, p. 379, R. S. of Massachusetts;
Sec. 4952, Revised Laws of Minnesota, 1905.

It is respectfully submitted that under no possible construction of the law can the act of the defendant in error in importing the woman mentioned in the indictment for purposes of illicit sexual intercourse be regarded as other than a violation of the act.

The judgment, therefore, should be reversed.

CHARLES J. BONAPARTE,
Attorney-General.
ALFORD W. COOLEY,
Assistant Attorney-General.

JANUARY, 1908.

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Office Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY,
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 503.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

JOHN BITTY.

BRIEF FOR THE DEFENDANT IN ERROR.

EDWARD A. ALEXANDER,
Counsel for Defendant in Error.

(20,906.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 503.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

JOHN BITTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF FOR THE DEFENDANT IN ERROR.

Statement.

The facts are fairly and accurately stated in the Government's brief.

ARGUMENT.

It seems to defendant's counsel that the expressed intent of Congress is indefinite and ambiguous. Prior statutes leading up to the one under consideration had for their object the exclusion of prostitutes and persons who procure their importation. For the purpose of strengthening the

provisions "with regard to the importation of prostitutes" (p. 4, U. S. Brief), and of extending the scope of the law (p. 4, U. S. Brief) "so far as it relates to the immigration of prostitutes, in order effectively to prohibit undesirable practices alleged to have grown up," Congress enacted the statute in question.

What did Congress intend to include under the general phrase, "or for any other immoral purpose"?

Clearly Congress actually intended to prohibit and prevent "undesirable practices alleged to have grown up" in connection with the trade or business of importing prostitutes.

For the purpose of breaking up what the Solicitor General in his brief to advance this case has termed the "white slave trade," Congress prohibited the bringing into this country of any "prostitute," procuress, agent, employee, or other person, directly or indirectly, proximately or remotely, connected with bringing in prostitutes.

The phrase "or for any other immoral purpose," if literally interpreted, would cover cases where women or girls are brought in for the purpose of teaching them to steal, to swindle, or to commit other crimes not originating in the sexual relation.

Surely it was not the intention of Congress to cover any other cases than those directly or indirectly connected with the business or traffic of the "white slave trade" or of prostitution.

I.

THE RULE EJUSDEM GENERIS APPLIES.

The learned Attorney General in his brief cites several cases under point I which, in our opinion, have no application, for the reason that the general phrases therein used were necessary to carry out the objects for which the acts were passed. One illustration in this connection is as good as

many. In The State *v.* Holman (3 McCord, 306), cited by the Attorney General, the object of the statute was to prevent cheats and frauds in the sale and handling of cotton. The statute forbade the putting of stone, wood, trash-cotton, cotton seed, "or any matter or thing whatsoever" for the purpose of cheating or defrauding any person, and in that case it was of course held that it was immaterial what particular substance was put into any bag or bale, so long as it was placed there for the purpose of cheating or defrauding any person, as the very object of the legislation was to prevent cheating and defrauding in the sale of cotton.

In the case at bar, however, the object was not to include and make criminals out of every alien woman or girl brought here for some immoral purpose, but only to exclude and penalize practices connected with the business or traffic of importing prostitutes into this country.

It would serve no useful purpose to analyze every case cited by the learned Attorney General under point I in his brief, for the reason that in every one of these cases the general phrases were necessary in order that the act might prevent the evils at which the legislation was aimed.

Counsel for defendant conceded in the court below, and concedes here, that concubinage is highly immoral, and that it has been recognized as such by various States, which have passed laws against it. However, whether it be immoral or not is not the question. The only question involved on this point is whether or not Congress intended to legislate against those isolated cases where certain individuals come into this country with their mistresses.

The statute in question provides a very severe penalty. Being a criminal statute, it must be strictly construed, and under its terms a conviction cannot be had unless it is free from reasonable doubt that Congress intended to cover the case in question. Reasonable doubt has been defined to be moral certainty, and it must be clear from a careful perusal of the opinion of Judge Hough that the construction of this statute is not free from reasonable doubt.

The cases cited by the learned Attorney General under point II in his brief show that illicit sexual relations are immoral; that agreements founded upon promises of illicit cohabitation are void, as against good morals, and will not be enforced by courts; that fornication is immoral, as well as adultery; and that certain States of the Union and the District of Columbia have passed statutes penalizing both fornication and adultery.

Defendant's counsel concedes all of this, but cannot see how it is applicable to the case at bar. Because the State legislatures of several States have drawn no distinction between fornication and prostitution is no reason for holding that they could not legally have done so. The learned Attorney General states that both fornication and adultery, and also prostitution, are immoral in the eye of the law, and if they differ it is merely in the degree of immorality.

The same might be said of certain acts which are immoral and not criminal and those which are immoral and criminal. There is only a degree of difference in the immorality. For instance, the Court of Appeals of New York State held, in The People *v.* Blanchard, 90 N. Y., that the crime of obtaining property under false pretenses, *i. e.*, larceny, under the Penal Code of the State of New York, was not committed where the defendant obtained property upon false pretenses concerning his intention, although his act was just as immoral as the act of a criminal who obtained property by making false representations as to past facts.

Pollock in his work on Torts has said that a person's intention is a fact, just as much as any other fact. Yet, since it is a fact hardly capable of a correct ascertainment, it has been held that a false statement concerning it, on the faith of which property is obtained, is not criminal, although immoral to the highest degree.

It may be that Judge Hough should have stated in his opinion that the phrase "or other immoral purposes" should be construed to cover not only the case of procuresses, but

also the case of all agents or persons directly or indirectly engaged in the importation of prostitutes.

The term "prostitute" necessarily implies the idea of a female who hires the use of her body for money, whereas the term "mistress" implies the case of one who cohabits with a male without being married to him.

It may be, and in many cases is a fact, that a man's mistress never receives any pecuniary consideration for her immoral acts. There is a marked degree of difference between a prostitute and a mistress. If Congress had intended to cover the case of mistresses, who are not prostitutes, and who are in no way connected with the importation of prostitutes, or with the "white slave trade," Congress could and would readily have said so by the use of apt language, as it cannot be presumed that Congress, which is one of the most intelligent bodies of government in the world, does not know how to use the English language to adequately designate its intentions.

Had the defendant brought in this woman under the guise of her being his mistress, but intending that she be used for purposes of prostitution, he would be guilty. Congress did not intend to cover the case of men traveling abroad, who temporarily pick up some woman for their own purposes. Although such acts merit the most severe condemnation, and although they are highly immoral, it is not believed that Congress intended to act as the censor of all immorality, albeit in excluding aliens it has almost unlimited power.

Counsel for defendant only received a copy of the Government's brief on January 27, 1908, the date set for the argument, and has hurriedly dictated this brief in reply. Counsel for defendant, as stated to the court, has received no fee in this case; has not been able to communicate with his client, and came here out of respect for this court, at his own expense, and believes he is doing his full duty in submitting this brief, knowing that the court will use its own experience and judgment in construing this statute.

II.

It is incumbent on me in the performance of my duty to call the court's attention to the act under which the Government is prosecuting this appeal. It is believed that there is very serious doubt of the constitutionality of this act. The act gives the Government of the United States the right to appeal from a judgment or decree sustaining a demurrer to an indictment where the constitutionality or construction of a statute is involved. The act does not give to the defendant the right to appeal from a judgment or decree overruling his demurrer.

Furthermore, the act gives the Government the right to appeal in a criminal case where the construction of the statute is involved, and not in a criminal case where the defendant is indicted for violating a statute, but in which the construction of the statute does not come into question.

Furthermore, had the defendant in this case pleaded not guilty and gone to trial, had a jury been sworn, and a motion made for the direction of a verdict of acquittal, and granted, it is believed, under the jeopardy clause of the Constitution, the defendant could not again be tried, and no appeal would lie, but because he demurred an appeal does lie.

The difference between the State legislatures and Congress is that the State legislatures possess all of the powers of the people of the State, except those which are expressly prohibited, whereas Congress only possesses those powers expressly granted or necessarily implied to carry out the objects for which Congress was created or for which the powers conferred were given.

It is conceded that Congress has the power to increase or diminish the appellate power of the Supreme Court, but it is doubted whether the people of the United States have given to Congress the power to pass partial legislation, which affects differently persons in the same class covered by the legislation. It is claimed Congress has no such power.

If Congress did not have power to pass the act enabling the Government to prosecute this appeal, then that act is absolutely void, because an unconstitutional act is a mere nullity; this court has no jurisdiction, and this appeal is not before it.

This question may be considered either on a motion to dismiss the appeal or at any stage of the proceedings, if the act providing for the appeal is unconstitutional and void, since in that event it would go to the jurisdiction of the court.

Section 2, article 4, of the Constitution provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." The rights of different citizens may at any time be involved.

It is submitted that if a demurrer to an indictment is sustained for any other reason than upon the merits, the Government can prosecute the defendant by re-indictment. If, however, the merits were involved and the demurrer were sustained, the defendant would go free in every case except where the constitutionality of an act or its construction were in question.

An act providing for appeals in certain specific cases, and also giving the Government the right to appeal and not giving the same right to the defendant, seems not only to be partial legislation, but seems to be also in conflict with the Constitution, in that "the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States."

While there may be some doubt about this, our point I is sound, and therefore the judgment should be affirmed.

Respectfully submitted,

EDWARD A. ALEXANDER,
Counsel for Defendant in Error.

UNITED STATES *v.* BITTY.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

No. 503. Submitted January 27, 1908.—Decided February 24, 1908.

It is within the power of Congress to determine the regulations and exceptions under which this court shall exercise appellate jurisdiction in cases other than those in which this court has original jurisdiction and to which the judicial power of the United States extends; and the act of March 2, 1907, c. 2564, 34 Stat. 1246, permitting the United States to prosecute a writ of error directly from this court to the District or Circuit Courts in criminal cases in which an indictment may be quashed or demurrer thereto sustained where the decision is based on the invalidity or construction of the statute on which the indictment is based, is not unconstitutional because it authorizes the United States to bring the case directly to this court and does not allow the accused so to do when a demurrer to the indictment is overruled.

In construing an act of Congress prohibiting the importation of alien women for prostitution or other immoral purposes regard must be had to the views commonly entertained among the people of the United States as to what is moral and immoral in the relations between man and woman and concubinage is generally regarded in this country as immoral.

While penal laws are to be strictly construed they are not to be construed so strictly as to defeat the obvious intent of the legislature.

While under the rule of *ejusdem generis* the words "or other immoral purpose" would only include a purpose of the same nature as the principal subject to which they were added they do include purposes of the same nature, such as concubinage, when the principal subject is prostitution and the importation of women therefor.

The prohibition in the alien immigration act of February 20, 1907, c. 1134, 34 Stat. 898, against the importation of alien women and girls for the purpose of prostitution or any other immoral purpose includes the importation of an alien woman or girl to live as a concubine with the person importing her.

THE facts, which involve the construction of the acts of Congress regulating the immigration of aliens into the United States, are stated in the opinion.

The Attorney General and *Mr. Assistant Attorney General Cooley* for plaintiff in error:

The rule of *ejusdem generis* does not apply to this case. The rule is merely a technical rule of construction which the courts have frequently declined to apply, when by so doing the manifest intention of the legislature would have been defeated. *Wilkinson* v. *Leland*, 2 Peters, 662; *State* v. *Williams*, 2 Strob. L. R. 474; *Regina* v. *Payne*, L. R. 1; C. C. 27. See also *Willis* v. *Mabon*, 48 Minnesota, 140, 155; *Webber* v. *City of Chicago*, 148 Illinois, 314; *Gillock* v. *The People*, 171 Illinois, 307; *Woodworth* v. *State*, 26 Ohio St. 196; *Winters* v. *Duluth*, 82 Minnesota, 127; *City of St. Joseph* v. *Elliott*, 47 Mo. App. 418; *Foster* v. *Blount*, 18 Alabama, 687; *Haigh* v. *The Town Council of Sheffield*, L. R. 10; Q. B. 102; *Bows* v. *Fenwick*, L. R. 9; C. P. 339.

The immigration act of 1907 should be considered as a whole and in connection with other statutes *in pari materia* in determining its meaning. When §§ 2 and 3 of the act are read together they show the clearly expressed purpose of the Congress to prevent the immigration of numerous classes of persons regarded as undesirable additions to the population of the country. Among those excluded are idiots, epileptics, paupers, professional beggars, persons afflicted with tuberculosis or any loathsome or dangerous contagious disease, persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude, polygamists, anarchists, and contract laborers, as well as prostitutes and women or girls brought in for purposes of prostitution or for any other immoral purpose.

The Congress has deliberately made the exclusion of persons more comprehensive in the act of 1907 than in the acts of 1891 (26 Stat. 1084), 1893 (27 Stat. 569), and 1903 (32 Stat. 1213). The narrow construction placed upon the act by Judge Hough

defeats the intention of the legislature, which clearly was to exclude various undesirable classes of persons, among others women of loose moral character.

Even should the rule *ejusdem generis* be applied herein, the finding of the court below is not warranted by the language of the statute. The words "for any other immoral purpose" must be given some meaning, and that given to them by the trial court limits them to an extent evidently not contemplated by Congress. The courts have repeatedly refused, even when applying the rule of *ejusdem generis*, to apply it in a narrow sense. *Misch* v. *Russell*, 136 Illinois, 22; *Queen* v. *Edmundson*, 2 Ellis & Ellis, 77; *County of Union* v. *Ussery*, 147 Illinois, 204.

It can hardly be denied that the act of the defendant in error in importing the woman mentioned in the indictment is one which is generally condemned by the moral sense of all enlightened communities and is assuredly contrary to purity. But it is more than that. Both the common and statute law have uniformly recognized illicit sexual relations as immoral, and courts have repeatedly refused to enforce contracts the consideration for which was future illicit cohabitation. Such purpose is one which the law seeks to defeat and holds as against sound public policy and deserving of condemnation by right-thinking men.

The conduct of the defendant in error was "immoral" as matter of strict law and this position is amply sustained by state and Federal authorities. *Ralston* v. *Boady*, 20 Georgia, 449, and cases cited; *Potter* v. *Gracie*, 58 Alabama, 303; *Walker* v. *Perkins*, 3 Burrows, 1568; *S. C.*, 1 W. Black, 517; *Nye* v. *Moseley*, 6 Barnewall & Cresswell, 133. See also *Walker* v. *Gregory*, 36 Alabama, 180; *Winebrinner* v. *Weisiger*, 19 Kentucky, 33; *Reed* v. *Brewer*, 36 S. W. Rep. 99; *Mackbee* v. *Griffith*, 2 Cranch C. C. 336.

Mr. Edward A. Alexander for defendant in error:

Counsel for defendant conceded in the court below, and concedes here, that concubinage is highly immoral, and that

it has been recognized as such by various States, which have passed laws against it. However, whether it be immoral or not is not the question. The only question involved on this point is whether or not Congress intended to legislate against those isolated cases where certain individuals come into this country with their mistresses.

The statute in question is a criminal statute and must be strictly construed.

The term "prostitute" necessarily implies the idea of a female who hires the use of her body for money, whereas the term "mistress" implies the case of one who cohabits with a male without being married to him.

There is a marked degree of difference between a prostitute and a mistress. If Congress had intended to cover the case of mistresses, who are not prostitutes, and who are in no way connected with the importation of prostitutes, or with the "white slave trade," Congress could and would readily have said so by the use of apt language, as it cannot be presumed that Congress, which is one of the most intelligent bodies of government in the world, does not know how to use the English language to adequately designate its intentions.

The act of Congress under which this appeal was prosecuted by the United States is of doubtful validity.

The act gives the Government of the United States the right to appeal from a judgment or decree sustaining a demurrer to an indictment where the constitutionality or construction of a statute is involved. The act does not give to the defendant the right to appeal from a judgment or decree overruling his demurrer.

Furthermore, the act gives the Government the right to appeal in a criminal case where the construction of the statute is involved, and not in a criminal case where the defendant is indicted for violating a statute, but in which the construction of the statute does not come into question.

Furthermore, had the defendant in this case pleaded not guilty and gone to trial, had a jury been sworn, and a motion

made for the direction of a verdict of acquittal, and granted, it is believed, under the jeopardy clause of the Constitution, the defendant could not again be tried, and no appeal would lie, but because he demurred an appeal does lie.

The difference between the state legislatures and Congress is that the state legislatures possess all of the powers of the people of the State, except those which are expressly prohibited, whereas Congress only possesses those powers expressly granted or necessarily implied to carry out the objects for which Congress was created or for which the powers conferred were given.

It is conceded that Congress has the power to increase or diminish the appellate power of the Supreme Court, but it is doubted whether the people of the United States have given to Congress the power to pass partial legislation, which affects differently persons in the same class covered by the legislation.

Section 2, Article IV, of the Constitution provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States."

An act providing for appeals in certain specific cases, and also giving the Government the right to appeal and not giving the same right to the defendant, seems not only to be partial legislation, but seems to be also in conflict with Art. IV, § 2, of the Constitution, providing that "the citizens of each State shall be entitled to all privileges and immunities of the citizens in the several States."

MR. JUSTICE HARLAN delivered the opinion of the court.

This is a criminal prosecution under an act of Congress regulating the immigration of aliens into the United States.

By the act of March 3, 1875, c. 141, relating to immigration, it was made a felony, punishable by imprisonment not exceeding five years and by fine not exceeding five thousand dollars, for any one knowingly and willfully to import or to cause the importation of women into the United States for the purposes of "prostitution." 18 Stat. 477.

By the act of March 3, 1903, § 3, c. 1012, it was provided: "That the importation into the United States of any woman or girl for the purposes of prostitution is hereby forbidden; and whoever shall import or attempt to import any woman or girl into the United States for the purposes of prostitution, or shall hold or attempt to hold, any woman or girl for such purposes in pursuance of such illegal importation shall be deemed guilty of a felony, and, on conviction thereof, shall be imprisoned not less than one nor more than five years and pay a fine not exceeding five thousand dollars." 32 Stat. 1213, 1214, Pt. 1.

A more comprehensive statute regulating the immigration of aliens into the United States was passed on February 20, 1907, c. 1134. By that act the prior act of 1903 (except one section) was repealed. The third section of this last statute was in these words: "That the importation into the United States of any alien woman or girl for the purpose of prostitution, *or for any other immoral purpose*, is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien woman or girl for the purpose of prostitution, or for any other immoral purpose, or whoever shall hold or attempt to hold any alien woman or girl for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, or harbor in any house or other place, for the purpose of prostitution, or for any other immoral purpose, any alien woman or girl, within three years after she shall have entered the United States, shall, in every such case, be deemed guilty of a felony, and on conviction thereof be imprisoned not more than five years and pay a fine of not more than five thousand dollars; and any alien woman or girl who shall be found an inmate of a house of prostitution or practicing prostitution, at any time within three years after she shall have entered the United States, shall be deemed to be unlawfully within the United States and shall be deported as provided by sections twenty and twenty-one of this Act." 34 Stat. 898, Pt. 1.

The defendant in error Bitty was charged by indictment in

the Circuit Court of the United States for the Southern District of New York with the offense of having unlawfully, willfully, and feloniously imported into the United States from England a certain named alien woman for "an immoral purpose," namely, "that she should live with him as his concubine."

The Circuit Court having sustained a demurrer to the indictment and dismissed the case the United States prosecuted this writ of error under the authority of the act of March 2, 1907, 34 Stat. 1246, c. 2564. That statute authorizes a writ of error, on behalf of the United States, from the District or Circuit Courts directly to this court in all criminal cases in which an indictment is quashed or set aside or in which a demurrer to the indictment or any count thereof is sustained, "where such decision or judgment is based upon the invalidity or construction of the statute upon which the indictment is founded."

The demurrer to the indictment was sustained and the indictment dismissed upon the ground that the statute, properly construed, did not make it an offense for one to bring and import an alien woman into the United States for the purpose of having her live with him as his concubine. The case is, therefore, one in which the United States was entitled, under the above act of 1907, to prosecute a writ of error from this court unless, as the accused suggests, the act is unconstitutional in that it authorizes the United States in the cases specified to bring the case directly to this court, but does not allow the accused to bring it here when a demurrer to the indictment or to some count thereof is overruled. There is no merit in this suggestion. Except in cases affecting ambassadors and other public ministers and consuls and those in which a State shall be a party—in which cases this court may exercise original jurisdiction—we can exercise appellate jurisdiction, both as to law and fact, with such exceptions and under such regulations as Congress shall make in the other cases to which by the Constitution the judicial power of the United States extends. Const. Art. III, § 2. What such exceptions and regula-

tions should be it is for Congress, in its wisdom, to establish, having of course due regard to all the provisions of the Constitution. If a court of original jurisdiction errs in quashing, setting aside or dismissing an indictment for an alleged offense against the United States, upon the ground that the statute on which it is based is unconstitutional, or upon the ground that the statute does not embrace the case made by the indictment, there is no mode in which the error can be corrected and the provisions of the statute enforced, except the case be brought here by the United States for review. Hence—that there might be no unnecessary delay in the administration of the criminal law, and that the courts of original jurisdiction may be instructed as to the validity and meaning of the particular criminal statute sought to be enforced—the above act of 1907 was passed. Surely such an exception or regulation is in the discretion of Congress to prescribe, and does not violate any constitutional right of the accused. *Taylor* v. *United States*, 207 U. S. 120. Congress was not required by the Constitution to grant to an accused the privilege of bringing here upon the overruling of a demurrer to the indictment and before the final determination of the case against him, the question of the sufficiency of the indictment simply because, in the interest of the prompt administration of the criminal law, it allowed the United States to prosecute a writ of error directly to this court for the review of a final judgment which stopped the prosecution by quashing or dismissing the indictment upon the ground of the unconstitutionality or construction of the statute.

We come now to the merits of the case, and they are within a very narrow compass. The earlier statutes, we have seen, were directed against the importation into this country of alien women for the purposes of prostitution. But the last statute, on which the indictment rests, is, we have seen, directed against the importation of an alien woman "for the purpose of prostitution *or* for any other immoral purpose;" and the indictment distinctly charges that the defendant imported the alien woman in question "that she should live with him as his concubine,"

that is, in illicit intercourse, not under the sanction of a valid or legal marriage. Was that an immoral purpose within the meaning of the statute? The Circuit Court held, in effect, that it was not, the bringing of an alien woman into the United States that she may live with the person importing her as his concubine not being in its opinion an act *ejusdem generis* with the bringing of such a woman to this country for the purposes of "prostitution." Was that a sound construction of the statute?

All will admit that full effect must be given to the intention of Congress as gathered from the words of the statute. There can be no doubt as to what class was aimed at by the clause forbidding the importation of alien women for purposes of "prostitution." It refers to women who for hire or without hire offer their bodies to indiscriminate intercourse with men. The lives and example of such persons are in hostility to "the idea of the family, as consisting in and springing from the union for life of one man and one woman in the holy estate of matrimony; the sure foundation of all that is stable and noble in our civilization; the best guaranty of that reverent morality which is the source of all beneficent progress in social and political improvement." *Murphy* v. *Ramsey*, 114 U. S. 15, 45. Congress no doubt proceeded on the ground that contact with society on the part of alien women leading such lives would be hurtful to the cause of sound private and public morality and to the general well-being of the people. Therefore the importation of alien women for purposes of prostitution was forbidden and made a crime against the United States. Now the addition in the last statute of the words, "or for any other immoral purpose," after the word "prostitution," must have been made for some practical object. Those added words show beyond question that Congress had in view the protection of society against another class of alien women other than those who might be brought here merely for purposes of "prostitution." In forbidding the importation of alien women "for any other immoral purpose," Congress evidently thought

that there were purposes in connection with the importations of alien women which, as in the case of importations for prostitution, were to be deemed immoral. It may be admitted that in accordance with the familiar rule of *ejusdem generis*, the immoral purpose referred to by the words "any other immoral purpose," must be one of the same general class or kind as the particular purpose of "prostitution" specified in the same clause of the statute. 2 Lewis' Sunderland Stat. Const., § 423, and authorities cited. But that rule cannot avail the accused in this case; for, the immoral purpose charged in the indictment is of the same general class or kind as the one that controls in the importation of an alien woman for the purpose strictly of prostitution. The prostitute may, in the popular sense, be more degraded in character than the concubine, but the latter none the less must be held to lead an immoral life, if any regard whatever be had to the views that are almost universally held in this country as to the relations which may rightfully, from the standpoint of morality, exist between man and woman in the matter of sexual intercourse. We must assume that in using the words "or for any other immoral purposes," Congress had reference to the views commonly entertained among the people of the United States as to what is moral or immoral in the relations between man and woman in the matter of such intercourse. Those views may not be overlooked in determining questions involving the morality or immorality of sexual intercourse between particular persons. Chief Justice Marshall, speaking for the court, said that "though penal laws are to be construed strictly, they are not to be construed so strictly as to defeat the obvious intention of the legislature. The maxim is not to be so applied as to narrow the words of the statute to the exclusion of cases which those words, in their ordinary acceptation, or in that sense in which the legislature has obviously used them, would comprehend. The intention of the legislature is to be collected from the words they employ. . . . The case must be a strong one indeed, which would justify a court in departing from the plain

meaning of words, especially in a penal act, in search of an intention which the words themselves did not suggest." *United States* v. *Wiltberger*, 5 Wheat. 76, 95, 96. In *United States* v. *Winn*, 3 Sumner, 209, 211, Mr. Justice Story said that the proper course is "to search out and follow the true intent of the legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the legislature." To the same effect are *United States* v. *Morris*, 14 Pet. 464; *American Fur Co.* v. *United States*, 2 Pet. 358, 367; *United States* v. *Lacher*, 134 U. S. 624, 628; Sedgwick on Stat. Constr. (2d ed.) 282; Maxwell on Interpretation of Statutes, (2d ed. 318). Guided by these considerations and rules, we must hold that Congress intended by the words "or for any other immoral purpose," to include the case of anyone who imported into the United States an alien woman that she might live with him as his concubine. The statute in question, it must be remembered, was intended to keep out of this country immigrants whose permanent residence here would not be desirable or for the common good, and we cannot suppose either that Congress intended to exempt from the operation of the statute the importation of an alien woman brought here only that she might live in a state of concubinage with the man importing her, or that it did not regard such an importation as being for an immoral purpose.

The judgment must be reversed, and the case remanded with directions to set aside the order dismissing the indictment and overrule the demurrer, and for such further proceedings as will be consistent with this opinion.

It is so ordered.